IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE MOUNTBATTEN SURETY COMPANY, INC.,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO: 00-CV-1255
BRUNSWICK INSURANCE AGENCY d/b/a BRUNSWICK COMPANIES,	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, J. JULY 27, 2000

Before this Court is Defendant Brunswick Insurance Agency's ("Brunswick") Motion to Dismiss Mountbatten Surety Company's ("Mountbatten") Complaint. For the reasons that follow, the Motion is granted in part and denied in part.

I. BACKGROUND.

This case arises out of an Agency Agreement between Brunswick and Mountbatten pursuant to which Brunswick issued eight surety bonds with an aggregate penal sum of nearly $8,000,000 to R & R Geo Construction ("R & R"), with Bell-BCI Company ("Bell") as obligee. The bonds were for four construction subcontracts between R & R and Bell in connection with a waste water treatment plant upgrade in Alexandria, Virginia (the "Bell project"). The bonds issued by Brunswick provided that in the event of a default by R & R, Mountbatten's

liability would arise once Bell's costs under any replacement contract exceeded the amount of its original contract with R & R.[1] R & R defaulted, and, according to the Complaint, Bell submitted a claim to Mountbatten seeking relief in excess of $1,200,000. The work in connection with the Bell project is still ongoing.

The Agency Agreement provides that Brunswick must obtain written approval from Mountbatten before issuing bonds in Mountbatten's name. It also contains a comprehensive indemnity clause under which Brunswick agreed to defend and hold harmless Mountbatten against claims brought against Mountbatten resulting from any breach of the Agency Agreement by Brunswick.[2] According

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[1] Specifically, the bonds at issue provide, in pertinent part, that

> The balance of the subcontract price, as defined below, shall be credited against the reasonable costs of completing performance of the subcontract. If completed by the Obligee, and the reasonable cost exceeds the balance of the subcontract price, the Surety shall pay to the Obligee such excess, but in no event shall the aggregate liability of the Surety exceed the amount of this bond. The term "balance of the subcontract price", as
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> used in this paragraph, shall mean the total amount payable by Obligee to Principal under the subcontract, and any amendments thereto, less the amounts heretofore properly paid by Obligee under the subcontract.

(Performance Bonds at ¶ 3).

[2] The indemnification clause provides, in pertinent part, that

> The Agency agrees and does hereby indemnify, defend and

to Brunswick's counsel at a July 20, 2000 hearing on this Motion, Brunswick does not deny that it failed to secure Mountbatten's written approval under the Agency Agreement before issuing the bonds. (N.T. 7/20/00 at p. 7-8). However, Brunswick does assert that it properly issued them pursuant to oral authority by Mountbatten, as had allegedly become the custom between the parties. Id.

Mountbatten filed this suit against Brunswick, alleging negligence, breach of contract and breach of fiduciary duty. Specifically, Mountbatten complains that: (1) Brunswick did not submit written bond requests to Mountbatten for R & R's potential contracts with Bell; (2) Mountbatten was never informed about the bonds until Brunswick delivered them to R & R; (3) Brunswick was negligent for delivering the bonds to R & R without getting permission from Mountbatten; (4) Brunswick was not authorized to

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> hold harmless the Company . . . from and against any claims, demands, losses, liabilities, suits, causes of actions, judgments, costs and expenses, including attorney's fees, and any other damages whatsoever, that the Company may sustain or incur relating to Agent's performance or non-performance under this Agreement by reason of and including but not limited to (1) Agency having executed or procured the execution of any bond or bonds, (2) Agent failing to perform or comply with any of the covenants or conditions of this Agreement, (3)any payment, compromise, judgment, fine, penalty, or similar charge paid by the Company, or (4) the Company enforcing any of the covenants or conditions of this Agreement.

(Agency Agreement at ¶ 17).

execute and deliver the bonds without getting prior approval from Mountbatten; and (5) Brunswick was negligent in hiring, supervising and training its employees. Mountbatten seeks to recover $1,200,000 in compensatory damages, the amount it represents that Bell is claiming against it as damages. Mountbatten also seeks an order compelling Brunswick to immediately account for all bonds it has issued in Mountbatten's name. Finally, Mountbatten seeks a declaratory judgment declaring that Brunswick is liable to Mountbatten for all of its damages to date and all future damages in relation to the Bell project which are as a result of Brunswick's alleged breach of the Agency Agreement.

II. STANDARD OF REVIEW.

The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the allegations contained in the complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). Under Rule 12(b)(6), the Court must determine whether the allegations contained in the complaint, construed in the light most favorable to the plaintiff, show a set of circumstances which, if true, would entitle the plaintiff to the relief he requests. Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997)(citing Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996)). A complaint will be dismissed only if the plaintiff could not prove any set of facts which would entitle him to relief. Nami, 82

F.3d at 65 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Similar standards apply under Federal Rule of Civil Procedure 12 (b)(1), which allows for dismissal of a complaint for lack of subject matter jurisdiction. "In deciding a motion to dismiss under 12(b)(1) filed before an answer is submitted - that is, a facial challenge to jurisdiction - all allegations contained in the complaint must be regarded as true." Rannels v. Hargrove, 731 F. Supp. 1214, 1217(E.D.Pa. 1990)(citing Cardio-Medical Assocs. v. Crozer-Chester Med. Center, 721 F.2d 68, 75 (3d Cir. 1983)).

III. DISCUSSION.

In its Motion, Brunswick argues that Mountbatten has: (1) failed to allege any damages proximately caused by Brunswick; (2) failed to present a claim ripe for declaratory review; and (3) failed to state a claim upon which relief may be granted with respect to its request for an accounting of all other Mountbatten bonds issued by Brunswick. (Def.'s Reply Br. at unnumbered pp. 4-5).

With respect to the claim for an accounting of all Mountbatten bonds issued by Brunswick, although Brunswick's Motion contested this claim, during the 7/20/00 hearing on this matter, counsel for Brunswick represented to this Court that Brunswick did not oppose the request for an accounting and that Brunswick would provide one immediately. (N.T. 7/20/00 at p. 9-

10). Therefore, this issue has been resolved.

Next, citing case law in the insurance context, Brunswick contends that Mountbatten has failed to state a claim upon which relief may be granted because it "failed to plead that [it] would not have issued the bonds but for Brunswick's alleged misconduct and, in so doing, failed to allege any allegations of proximate cause against Brunswick." (Def.'s Mem. Law Supp. Mot. Dismiss at unnumbered p. 10; Def.'s Reply Br. at unnumbered p. 3). Assuming that the authority cited by Brunswick is applicable to the instant case, we find that while Mountbatten did not include the precise language Brunswick would require, the Complaint, in its entirety, sufficiently indicates that Mountbatten would not have issued the bonds absent Brunswick's negligence. Mountbatten has specifically stated that Brunswick was required to obtain written approval from Mountbatten prior to issuing any bonds, and that without that approval, the issuance of the bonds was unauthorized. (See Compl. at ¶¶ 14-17). Brunswick's Motion is therefore denied with regard to this argument.

Finally, Brunswick argues that Mountbatten's claims are not appropriate for declaratory review based upon principles of standing. Brunswick asserts that Mountbatten has not suffered a sufficient injury as required by the "case or controversy" provision of Article III of the United States Constitution.

Specifically, Brunswick argues that Mountbatten's claim for present and future damages resulting from Brunswick's alleged breach is speculative, since Mountbatten may or may not sustain any damages in connection with the Bell project.

Mountbatten contends that it suffered injury when Bell submitted its claim, for which Mountbatten immediately became primarily liable under the bonds, when Brunswick breached the agreement by failing to obtain written approval before issuing the bonds. Alternatively, Mountbatten argues that at the very least, it faces the threat of imminent harm, since Bell's replacement contract costs will most likely exceed its contract price with R & R, and therefore Bell is likely to file a lawsuit against Mountbatten in the near future.

The United States Court of Appeals for the Third Circuit ("Third Circuit") has noted the difficulty of defining with precision the parameters of the ripeness doctrine, particularly in the context of declaratory judgment actions. Step-Saver Data Sys. v. Wyse Tech., Inc., 912 F.2d 643, 646 (3d Cir. 1990).

> First, there is the considerable amount of discretion built into the Declaratory Judgment Act itself. Even when declaratory actions are ripe, the Act only gives a court the power to make a declaration regarding "the rights and other legal relations of any interested party seeking such declaration,". . . it does not require that the court exercise that power. Second, declaratory judgments are issued before "accomplished" injury can be established . . . and this ex ante determination of rights exists in some tension

> with traditional notions of ripeness. Nonetheless, because the Constitution prohibits federal courts from deciding issues in which there is no 'case[ ]' or 'controversy,'. . . declaratory judgments can be issued only when there is an 'actual controversy'. . ." The discretionary power to determine the rights of parties before injury has actually happened cannot be exercised unless there is a legitimate dispute between the parties.

Id. (internal citations omitted).

The Step-Saver court set forth the following factors in order to determine ripeness of a declaratory action: (1) the adversity of the interests of the parties; (2) the conclusiveness of the judicial judgment; and (3) the practical help, or utility of that judgment. Id. at 647. The Third Circuit has also cautioned that "in order to present a justiciable controversy in an action seeking a declaratory judgment to protect against a feared future event, the plaintiff must demonstrate that the probability of that future event occurring is real and substantial, 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" The Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio, et al., 40 F.3d 1454, 1466 (3d Cir. 1994)(citation omitted).

We agree that Mountbatten's claims are not ripe for declaratory review, as the threat of real and immediate harm is lacking. Bell cannot justifiably file suit against Mountbatten at this time. The bonds impose a condition precedent to liability - Mountbatten's liability does not arise until Bell's

cost of completing the work R & R was supposed to perform exceeds its subcontract price with R & R. Mountbatten has not alleged that this has occurred yet, and Mountbatten has not made any payment to Bell yet. Further, the amount Mountbatten currently seeks in relief does not exceed the balance of the subcontract price. Moreover, not only may Bell not sue Mountbatten at this time, it has not even attempted to initiate suit. While Mountbatten represents that given the difficulty of securing replacement contracts, it is likely that the replacement contract costs will exceed its original contract price with R & R, and therefore that Bell will file suit against it, this is insufficient to establish the requisite real and substantial probability of harm of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.[3]

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[3] In its pursuit of declaratory relief, Mountbatten also points to the indemnification clause in the Agency Agreement to argue that Brunswick's duty to defend and hold harmless Mountbatten is invoked as a result of Brunswick's failure to obtain Mountbatten's written approval before issuing the bonds to Brunswick. Whether Brunswick breached the agreement is, of course, disputed. Brunswick urges that this Court may not consider any claim arising out of the indemnification clause because it was not properly pled in the Complaint. However, the indemnification clause is directly quoted at paragraph 9 of the Complaint. Count II of the Complaint, which incorporates all previous paragraphs, asserts a breach of the Agency Agreement. This claim was sufficiently pled in the Complaint under the federal notice pleading standards.

Nonetheless, it does not form an appropriate basis for declaratory review. As explained above, as of yet, no action has been taken by Bell, nor could be taken, against which Brunswick would be required to defend, since Bell's replacement contract costs have not exceeded its original contract price with R & R,

In Step-Saver, the Third Circuit was faced with an analogous situation. The plaintiff, a seller of packaged computer systems, sought a declaratory judgment that defendants, a manufacturer of computer terminals who had allegedly falsely warranted that Step-Saver's products were compatible with their terminals, were responsible for any liability Step-Saver may have

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as required for the imposition of liability upon Mountbatten under the bonds. Mountbatten has not established the requisite threat of imminent harm required to make this claim justiciable.

Mountbatten attempts to circumvent this issue by drawing a distinction between provisions for indemnification against loss and those against liability, arguing that the provision in question in this case is the latter type. Mountbatten cites Pennsylvania case law standing for the proposition that a claim for indemnification against liability arises as soon as liability is incurred, even if there is no actual loss. Arguing also that under Virginia law, Mountbatten, as a surety, became primarily liable to Bell as soon as R & R defaulted, Mountbatten therefore claims that the indemnification clause has been triggered, and that Brunswick should defend against Bell's claims, without requiring Mountbatten to first expend monies in connection with that anticipated litigation. However, this argument, too, is unavailing, as it continues to ignore the existence and impact of the as yet unmet condition precedent to its liability. Moreover, Mountbatten's reliance on ACandS, Inc. v. The Aetna Cas. & Sur. Co., 666 F.2d 819 (3d Cir. 1981), as standing for the proposition that "a dispute concerning the refusal to indemnify and defend is a current obligation constituting a case or controversy worthy of adjudication," (Pl.'s Br. Opp'n Mot. Dismiss at pp. 16-17), is misplaced. In ACandS, numerous lawsuits had actually been filed against the plaintiff, an insulation installer, in connection with its customers' exposure to asbestos. Id. at 821. The plaintiff sought declaratory review regarding duty to defend clauses contained in its agreements with its insurance companies. Id. at 821-22. Unlike in the instant case, ACandS did not involve a bar to the Obligor's liability until a condition precedent had been met. Accordingly, the court held that since the obligation to defend had arisen, the issue of the parties' respective responsibilities was ripe for declaratory review. Id. at 823.

to its customers as a result of customers' suits filed against Step-Saver because of computer system malfunction. Id. at 645. The court held that the claim for declaratory relief was not ripe, because, among other reasons, it requested a declaratory judgment based upon a contingency - "if" the customer suits established a defect. Id. at 648. The court noted that even if it were to issue the judgment, the legal status of the parties would not change or become clarified because "our declaration itself would be a contingency." Id.

Similarly, in the instant case, Mountbatten seeks a declaratory judgment based on a contingency - a suit against it by Bell. Bell has not and presently cannot justifiably seek hold Mountbatten liable in connection with the Bell project. Whether Bell will attempt to do so in the future, once the condition precedent has been met, is uncertain. Accordingly, as in Step-Saver, a declaratory judgment in this case is not warranted.

Although there is no basis, at this time, for Mountbatten's request for declaratory review, Mountbatten is entitled to have its claims adjudicated in the ordinary course of litigation. Therefore, we deny Brunswick's Motion to Dismiss with respect to all of Mountbatten's claims except the requests for declaratory relief.

An appropriate Order follows.